and discharge of the respondent on June 23 the same year without his defence being called.

From the appeal records, it is clear that the private prosecution was instituted and conducted at all relevant times on the basis that the offence under section 15(1)(d) of the Copyright Act was a non-seizable offence. Although under section 376(i) of the Criminal Procedure Code the Public Prosecutor shall have the control and direction of all criminal prosecutions and proceedings under the Code, "any private person may appear in person or by advocate or, in the State of Trengganu, by a pleader and prosecute for an offence against his own person or property", in summary non-seizable cases in a court of a Magistrate — see section 380(c) Criminal Procedure Code. But in respect of private prosecution for a seizable offence before a Magistrate, it can only be done by an advocate or a pleader employed by the complainant if he is so "expressly authorised in writing by the Public Prosecutor or by a Deputy Public Prosecutor" — see section 377(a) Criminal Procedure Code.

Unbeknown to counsel for the complainant, counsel for the defendant and the learned Magistrate, the non-seizable offence under section 15(1)(d) of the Copyright Act 1969 has become seizable by the amendment made to section 15 by Copyright (Amendment) Act 1979 (Act A461) which was published in the *Gazette* on August 23, 1979, and came into force on that date by virtue of section 19(2) of the Interpretation Act 1967. By that amendment, the punishment provided for any offence under section 15(1)(d) of the Copyright Act has been increased from a fine not exceeding two thousand dollars for each infringing copy in respect of which the offence was committed or one hundred thousand dollars, whichever is the lower, to ten thousand ringgit for each infringing copy or one hundred thousand ringgit, whichever is the lower, or to imprisonment for a term not exceeding five years or to both imprisonment and fine. Under the First Schedule to the Criminal Procedure Code, it is clear that the original offence under section 15(1)(d) being punishable with fine only, was non-seizable, but with effect from August 23, 1979, it has become seizable, and, as such, the prosecution for such an offence cannot be conducted by an advocate or a pleader unless he has a fiat from the Public Prosecutor or Deputy Public Prosecutor.

In this case, it is not challenged that at all material times neither advocate Mr. Wong for the complainant nor the complainant himself had a written authority from the Public Prosecutor or his Deputy to prosecute. In my view, such omission is not a mere irregularity but an illegality that cannot be cured by section 422 of the Criminal Procedure Code and, as such, the private prosecution before the Magistrate was a nullity *ab initio*.

In the circumstances, I allow this appeal. The order of acquittal is set aside. An order of discharge not amounting to an acquittal is substituted.

Order accordingly.

Solicitors: *D.P. Vijendran Associates.*

SHAHARUDDIN BIN ABDUL RAHMAN v. SATISAH ISMAIL SDN. BHD.

[A.C.J. (Ajaib Singh J.) April 5, 1982]
[Ipoh — Civil Appeal No. 24 of 1981]

Practice and Procedure — Defendant absent but counsel present — Judgment in default — Magistrate erred — Scope of Subordinate Courts Rules 1980, O. 28 r. 6(1)(a).

The facts of this case were as follows. The plaintiffs' claim for $3,904.00 being advance made to the defendant was denied by the defendant. At the hearing, the plaintiffs' representative was present together with their counsel. The defendant was absent but his counsel was present. Thereafter, on the oral application of the plaintiffs' counsel, the learned magistrate gave judgment in favour of the plaintiffs under the Subordinate Courts Rules 1980, under O. 28 r. 6(1)(a).

Held, allowing the appeal: (1) the learned magistrate was not empowered to invoke rule 6(1)(a) of Order 28 and give judgment in default;

(2) if the learned magistrate was not inclined to exercise his discretion in favour of granting an adjournment he ought to have proceeded to hear and determine the action in the normal manner which meant that the plaintiff had to prove their case by adducing sufficient evidence and their witnesses would have been subject to cross-examination by the defendant's counsel who would also have the right to call witnesses for the defence and to make a submission to the court at the end of the hearing. Similarly, if the plaintiff is absent but his counsel is present when an action is called on for hearing the court cannot just dismiss the action but must allow the plaintiff's counsel to present his case and call witnesses if he has any in support;

(3) the old rule 2(i) of Order 19 was removed from the new rules as it served no purpose. It was redundant. Both the old and new rules provide for the parties to be represented by counsel;

(4) at the hearing of an action the defendant is thus allowed to either appear in person or by counsel; Only if both the defendant and his counsel are absent may a default judgment be entered against the defendant.

CIVIL APPEAL.

Paramjit Singh for the appellant.

Lalchand N. Thadani for the respondent.

Cur. Adv. Vult.

Ajaib Singh J.: This is an appeal against the decision of the learned magistrate who had given judgment against the defendant by default. The plaintiffs' claim was for the sum of $3,904 being advances made to the defendant and the defendant had filed a defence denying the claim. When the action was called on for hearing on July 4, 1981 the plaintiffs' representative was present together with their counsel. The defendant was absent but his counsel was present. Thereafter on the oral application of the plaintiffs' counsel the learned magistrate gave judgment in favour of the plaintiffs under Order 28 rule 6(1)(a) of the Subordinate Courts Rules 1980 which reads as follows —

"6. (1) If, when an action, other than actions to which Orders 43 and 45 apply, is called on for hearing, the plaintiff appears but the defendant does not appear, the court may:

(a) if the defendant has no counterclaim, on proof of service give judgment for the plaintiff on his claim;"

In my view it was wrong for the learned magistrate to give judgment against the defendant by default. It is true that the defendant himself was absent when the case was called up for hearing but as his counsel was present the learned magistrate was not empowered to invoke rule 6(1)(a) of Order 28

and give judgment by default. If the learned magistrate was not inclined to exercise his discretion in favour of granting an adjournment he ought to have proceeded to hear and determine the action in the normal manner which meant that the plaintiffs had to prove their case by adducing sufficient evidence and their witnesses would have been subject to cross-examination by the defendant's counsel who would also have had the right to call witnesses for the defence and to make a submission to the court at the end of the hearing. Similarly if the plaintiff is absent but his counsel is present when an action is called on for hearing the court cannot just dismiss the action but must allow the plaintiff's counsel to present his case and call witnesses if he has any in support.

In his grounds of judgment the learned magistrate referred to rule 2(1) of Order XIX of the old Subordinate Courts Rules 1950 which states that at the trial or hearing of an action any party may appear in person or by solicitor. This particular rule has been omitted from the present Subordinate Courts Rules 1980 and the learned magistrate apparently thought this omission to be of some significance. It seems to me however that the old rule 2(1) of Order XIX was removed from the new rules as it served no real purpose. It was redundant. Both the old and new rules provide for the parties to be represented by counsel. As for the representation by counsel for the defendant the very form of summons both under the old and the new rules states that the defendant is "hereby summoned to appear either in person or by your advocate". At the hearing of an action the defendant is thus allowed to either appear in person or by an advocate and solicitor. Only if both the defendant and his counsel are absent that a default judgment may be entered against the defendant.

The plaintiff or the defendant who stays away when an action is called on for hearing does so at his peril. If his oral testimony is material and important to his case it would be to his great disadvantage if he is absent for if the court in the exercise of its discretion refuses an adjournment and proceeds to hear the action his counsel would not be in a position to present his case well. This is a risk which a party takes by not attending court personally on the date fixed for the hearing of the case but if his counsel is present then the court cannot simply throw his case out.

For the reasons which I have set out I would say that the default judgment given against the defendant on July 4, 1981 was bad and irregular. The defendant was therefore entitled to bring his appeal to the High Court without first applying to the magistrate's court to set aside the judgment. In the circumstances therefore I allow the appeal and order that the case be remitted to the learned magistrate for hearing. As the learned magistrate has not heard the case on its merits he is perfectly entitled now to hear it himself or if he is so inclined to arrange for some other magistrate to hear it.

There will be no order as to costs.

Appeal allowed.

Solicitors: *Paramjit & Co.; Kamaluddin Maamor & Co.*